

# **Exhibit 1**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION  
CASE NO. 23-CV-14297-AMC

4 SALLY ARGONA, et al., Ft. Pierce, Florida

Plaintiffs,

August 14, 2024

vs.

SELENE FINANCE, LP

Pages 1 to 66

Defendant.

10 MOTION HEARING VIA TELECONFERENCE  
BEFORE THE HONORABLE RYON M. McCABE  
UNITED STATES MAGISTRATE JUDGE  
11 (TRANSCRIPT OF DIGITAL AUDIO RECORDING)

## 12 APPEARANCES:

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1 (PROCEEDINGS TRANSCRIBED FROM DIGITAL AUDIO RECORDING.)

2 THE COURT: I am calling the case of Cruz versus Selene  
3 Finance, 23-CV-14297.

4 Let me have appearances, starting with the plaintiff,  
5 please.

6 MR. MAGINNIS: Good afternoon, Your Honor, Edward  
7 Maginnis for the plaintiff, along with my co-counsel, Scott  
8 Harris and Katherine Ann Robinson.

9 THE COURT: All right. Defense.

10 MS. ACCARDI: Good afternoon, Your Honor, Sara Accardi  
11 on behalf of the defendant Selene Finance, and I've also got my  
12 client here on the Zoom, Christopher Bass.

13 THE COURT: All right. Scott Harris, you are -- who is  
14 the other one there, Katherine?

15 MR. HARRIS: She is an associate with our firm, Your  
16 Honor.

17 THE COURT: Okay. Excellent.

18 So, we are here on two motions. We have a motion to  
19 dismiss, and there is also a motion to strike a demand for jury  
20 trial.

21 Defense, I'll turn it over to you, but I have a few  
22 questions first. I'm going to let everyone make all the  
23 arguments they want to make, but I do have some questions. So  
24 I want to start with those, and I will sort of bounce the  
25 questions back and forth between you.

1                   I guess this is first a question for the plaintiff.

2                   I have searched the record and every version of the  
3 default letter that I find claims to be page one of three, and  
4 yet, I never find a page two or a page three.

5                   Am I correct about that?

6                   MR. MAGINNIS: I would have to look, Judge, and see if  
7 we've improperly not included an entire document. I can tell  
8 you that page two does have text which is relevant.

9                   Page three is just the end of a disclaimer, but we  
10 could get that to the Court immediately if the Court is not  
11 able to see a version of the letter that has all three pages,  
12 and specifically page two, because page two does have some text  
13 which is at issue.

14                  THE COURT: Yeah. I am going to ask -- I am going to  
15 instruct my law clerk who's on the line right now go back -- it  
16 should be attached to the amended complaint. Right?

17                  MR. MAGINNIS: It should be, yeah.

18                  THE COURT: Go to the amended complaint, Izzie, and  
19 look again.

20                  THE CLERK: I'm here right now. I mean, I'm looking at  
21 is it right now, DE 15. There is Exhibit A. Exhibit A is --  
22 like the text of Exhibit A is page one of two. Page two of two  
23 is just the first page of the notice of the letter, and it goes  
24 straight to Exhibit B, and that's the same thing, so there is  
25 no page two or page three.

1                   MR. MAGINNIS: What would be the best way to get that  
2 to you, Judge?

3                   We could e-mail you a copy of the letter right now.

4                   THE COURT: Well, let me ask the defense.

5                   Defense, did you also put it in? I thought you may  
6 have attached the letters in something in some of the papers  
7 you submitted to me.

8                   MS. ACCARDI: I, did Your Honor, yes. They are  
9 exhibits to, I believe our motion to dismiss, and we only also  
10 attached the first page since that was all that the plaintiff  
11 had attached to their complaint.

12                  I didn't want to bring in something that is external  
13 since it's a motion --

14                  THE COURT: All right. Which is an issue, because I am  
15 bound by what's on the complaint, unless the defense agrees  
16 that I can look at it.

17                  Defense, do you agree?

18                  Do you consent to that?

19                  I'm not going to look at anything that's not within the  
20 four corners of the complaint, quite frankly. Although, in  
21 fairness, you did give me the mortgage notes, which were not  
22 attached to the complaint either.

23                  MS. ACCARDI: That's true, Your Honor. I think an  
24 exception for that is that those are also publicly available.  
25 They were available because they were recorded in the official

1 records. I think those could be judicially noticed. The  
2 default notices could not, and I don't think we would consent  
3 to anything that wasn't attached and incorporated on the  
4 complaint.

5 I know Mr. Maginnis had mentioned additional language  
6 on page two. I don't know of any that was referenced in the  
7 complaint, so if there is additional language that he wants to  
8 base his claims off of, I think then we would need to, you  
9 know, include the full document.

10 THE COURT: Not that I'm going to allow it but,  
11 Mr. Maginnis, what is the language?

12 What's the gist of the language that's on page two?

13 MR. MAGINNIS: It's not dissimilar -- ultimately,  
14 Judge, I see where you're coming from, and we're not asking to  
15 convert this outside of the pleadings, but there is three  
16 similar contentions that we contend violate the statute and the  
17 one that's on the second page, which may not be in front of the  
18 Court, is a phrase that says, "If you send an amount less than  
19 the full amount due, Selene can apply the amount received to  
20 your account and proceed with the applicable foreclosure  
21 proceedings without further notice to you."

22 We believe that's false in the same way that some of  
23 the phrases on page one are false and for the same reasons.  
24 So, ultimately -- obviously, we would prefer to have the Court  
25 relying on a full document, but ultimately, if what we have is

1 page one, it has the same similar statements that we contend to  
2 be false based upon the restrictions from RESPA.

3 THE COURT: Okay.

4 I don't know that that additional language you are sort  
5 of proffering to me is really immaterial to the way I'm  
6 thinking about the case, but as we proceed through this  
7 argument, if I think it is, I will alert you and then you  
8 can -- well, I don't know what you'll have to do about that,  
9 quite frankly, because it's not on the record right now.

10 All right. My next question is this; as I read the  
11 case law -- and I will give this question first to the  
12 defendant, and then I will let the plaintiff have a response.

13 As I read the case law, the issue of whether or not  
14 this letter -- whether or not the letter constitutes a threat  
15 and whether or not it's false or misleading are both jury  
16 issues, and my job would be to determine, whether based upon  
17 the allegations on the complaint, could a reasonable jury who  
18 has been -- who has been instructed to use the least  
19 sophisticated consumer standard, would such a reasonable juror  
20 with that instruction in front of him or her, would they be  
21 able to find this to be a threat or would they be able to find  
22 it to be false or misleading.

23 Do you disagree that that's sort of the analysis that I  
24 should be making?

25 MS. ACCARDI: I don't think so, Your Honor. I do think

1       it is -- ultimately, it would be a fact question. I think it's  
2       still a fact question that could be resolved, honestly, on a  
3       motion to dismiss and has been by the Southern District in the  
4       Wise case, obviously, and actually, also by the Eleventh  
5       Circuit in Madura.

6                   So, it's not something that is prohibitive of  
7       determination on a motion to dismiss, Your Honor.

8                   THE COURT: Okay. Plaintiff, do you take a different  
9       view?

10                  MR. MAGINNIS: Judge, yeah. We agree with your  
11       position. Ultimately, we think it is a question of fact for  
12       the jury or perhaps summary judgment. We believe that it's  
13       plainly a threat, plainly misleading, but certainly not  
14       something that could be resolved against us on a motion to  
15       dismiss taking our allegations as true.

16                  The Wise case is an example that counsel has used in  
17       their brief, and I think what the theory of the Wise case is  
18       ultimately -- it's almost a truism. They say that the  
19       communication is a truism because they say, well, we haven't  
20       recorded the judgment, but we could at any moment. All of the  
21       conditions of precedent have been met and so the letter is not  
22       technically false because you could record a judgment at any  
23       moment.

24                  Whereas, we contend not only does Selene not act  
25       according to the letter, they can't. They haven't met any of

1 the conditions precedent associated with doing the things that  
2 they contend they do in the letter.

3 So, it's certainly not something that we think is a  
4 motion to dismiss question. The question for us is can we  
5 ultimately show the Court at a summary judgment standard that  
6 on a liability basis it's plainly a threat, but if the Court is  
7 inclined to think it's a jury question, we certainly wouldn't  
8 disagree with that.

9 THE COURT: All right. Let me move to my next  
10 question, and then, again, I'm going to give you all a chance  
11 to say whatever you want to say.

12 As I understand one of the defense arguments, the  
13 defense argument essentially is, we are required by TILA to  
14 send out a notice at the 45-day mark, doing, among other  
15 things, warning the homeowner of the possible risks, and one of  
16 those is foreclosure.

17 So, they are under a statutory obligation to send out  
18 this letter of warning that a foreclosure may result if they  
19 don't cure this thing. They're also obligated by their note  
20 and mortgage documents to send this to establish a cure date  
21 and that they've done it. That's what this letter does.

22 This letter is in compliance with their mortgage  
23 document and with TILA, which requires them to send the letter  
24 warning of the possible risks. And I understand your argument  
25 as to why it's false, but my question to you, plaintiff, is

1 what would you have them say?

2 How could they have written this letter and comply with  
3 what they are supposed to do?

4 MR. MAGINNIS: Well, yeah, and the case that was cited  
5 by both parties in this was -- Ms. Accardi certainly knows  
6 about it more than I do. It's her case, and ultimately, the  
7 Court found that you can have a TILA disclosure, you can follow  
8 the rules of TILA and still violate the FDCPA if it's also an  
9 effort to collect debt and you make a misrepresentation. I  
10 think in that case it was the amount.

11 So, our problem is not with sending a letter, and our  
12 problem is not with the usage of the plain text of the mortgage  
13 documents or what TILA would have them do. And what the  
14 mortgage document says is you've got to give them a deadline  
15 and it's got to be not less than 30 days.

16 So, the problem with the letter is they could fix it by  
17 moving that deadline to something greater than 30 days that  
18 puts them on the line with Fannie Mae's obligations.

19 There is additional language in there that we contend  
20 -- talking about the reality of the situation. We have no  
21 problem with notifying customers of the potential for  
22 acceleration of the foreclosure if they continue to default,  
23 but that's not what it says. It says, you have to pay this by  
24 this date or else -- essentially, your head is on the  
25 guillotine and you're at our mercy for acceleration of

1 foreclosure, and we have the ability to do that.

2 And the fact is that borrowers have far greater  
3 protections than that based upon federal law.

4 So, they could include the text from the mortgage and  
5 use a language that's consistent with 120 days if they actually  
6 accelerate and foreclose, or they can use additional text to  
7 make the letter true.

8 THE COURT: By the way, you agree that, obviously,  
9 accelerating and foreclosing are two different things, and  
10 although the Regulation X, I guess, prohibits them from  
11 starting a foreclosure until 121 days, but it doesn't prohibit  
12 them from accelerating. Right?

13 MR. MAGINNIS: Well, in Florida law -- typically,  
14 acceleration under Florida law comes with the foreclosure, and  
15 I know we're here on a motion to dismiss and not on the  
16 evidence, but ultimately that's what we really anticipate the  
17 evidence is going to show, given how far along we are on the  
18 case.

19 Yeah, we've plead that Selene does not accelerate in  
20 line with the letter, that they do it in context with the  
21 filing of a foreclosure lawsuit. So, actually acceleration  
22 takes place after foreclosure in Florida.

23 The referral of foreclosure comes at 120, and the  
24 acceleration comes when they file a lawsuit, but they are two  
25 different things.

1                   THE COURT: All right. Defense, I will give you a  
2 chance to respond to what he said, if you want to.

3                   MS. ACCARDI: Sure, Your Honor, I think the distinction  
4 here is a couple of things. The immediacy, I think, is the  
5 number one important distinction there, is that plaintiffs read  
6 into the language which is literally, at least from what is  
7 attached to the complaint now, a single line, that says, "We  
8 may accelerate if payment is not due," and they read into it  
9 this immediacy that we will accelerate the next day.

10                  And that is nowhere present in any of the notices that  
11 are at issue. There is no deadline prescribed as to when we  
12 will take that step. Nor is -- I mean, considering the  
13 language made, nor is even that Selene will take any action at  
14 all, right, definitely equivocal language there.

15                  So, I would think, to comply with the plaintiffs'  
16 reading of this, in the 120 days, you know, assuming again  
17 since we have to, since that's what's plead in the complaint  
18 that Selene, you know, doesn't move forward with acceleration  
19 until 120 days, assuming that is correct, then we would have to  
20 include in this notice something to the effect of, you know,  
21 your deadline is at the 120-day mark, and then we will  
22 immediately accelerate and foreclose the very next day, you  
23 know, which is just not practical under the circumstances, and  
24 is not required under the mortgage and would create a whole  
25 other host of other issues, I think, Your Honor.

1                   And you had mentioned and teed up my first argument  
2    that I would make, really, is that based on TILA and the  
3    expressed terms of the mortgage, these letters do comply with  
4    what is required of Selene. And plaintiffs' interpretation  
5    would place a whole load of additional burdens and expectations  
6    on something that is just not required by either federal law or  
7    the terms in the mortgage.

8                   THE COURT: Some of the case law in some of the default  
9    letters referenced in cases that I've read, which is one of the  
10    reasons I was interested in what's on the other pages of this  
11    letter, there is sort of a catchall provision that says, but we  
12    will not foreclose you in violation of the contract terms or  
13    the law, something like that.

14                  And a lot of courts have relied upon that, but this  
15    letter doesn't seem to have that.

16                  And is that an issue for you, to the defense?

17                  Does that -- in other words, does that distinguish this  
18    letter from the letters in those other cases?

19                  MS. ACCARDI: I think there is a few distinguishable  
20    points, and I do think, to Your Honor's credit, the entire  
21    letter needs to be read in conjunction with each other, right.  
22    It's not just singular terms. There is a provision, I believe,  
23    on the second page, saying something to the fact that we will  
24    pursue, you know, options available to us pursuant to the law,  
25    basically, and to the terms of the security agreement.

1           I don't think it's exactly on point or identical to the  
2 language you're referencing, but there is a reference to that.  
3   And I think the distinguishing factor from a lot of these  
4 cases, Your Honor, is the language that is cited, right, the  
5 threat, the purported threat. And, again, going back to this  
6 immediacy argument is that you have to kind of compare the two  
7 letters and say -- I know a lot of the line of case law that  
8 the plaintiffs rely on heavily is the Seterus line of questions  
9 that Mr. Maginnis' firm was involved in, and those letters  
10 particularly have much more immediacy elements in them.

11           They literally make the statement that if, you know,  
12 the default is not cured, we intend and will accelerate, and we  
13 -- I can quote the exact language to Your Honor, but it says,  
14 you know, immediate is in that language.

15           That is one of the most distinguishing factors,  
16 honestly, is this immediacy key, and the fact that that  
17 immediacy language is included in a lot of these default  
18 notices and it is expressly not included in Selene's.

19           THE COURT: All right. Those are my questions.

20           So, defense, we will start with you.

21           What else do you want to tell me?

22           MS. ACCARDI: Sure, Your Honor.

23           So, you kind of really hit on my first argument which  
24 is going to be the default notice is complying with the  
25 mortgage terms and TILA, so I will kind of skip that one since

1       it seems like have you a fairly good understanding of that.

2           I will go straight to kind of the heart of the  
3       argument, which is the FDCPA claims and whether they constitute  
4       a threat, and if so, a threat that cannot be taken, basically,  
5       a legally impermissible threat.

6           So, the case law on that -- I had previously mentioned  
7       the Wise case, Your Honor. I think that one is particularly  
8       instructive, where it basically said that a warning that a  
9       servicer could have a sheriff sell a debtor's property in order  
10      to pay off the judgment was a reality-based reminder and not a  
11      threat to take action that it could not take.

12           I think similarly here, Your Honor, again, at this  
13      point I think we've narrowed things at least based on the  
14      current allegations of the complaint to a single line in the  
15      default notice that states failure to clear the default on or  
16      before the date specified may result in acceleration.

17           That is what we're talking about.

18           So, to me, reading that is very akin to the Wise case  
19      were it's just providing you a reminder of what is going to  
20      occur. Right?

21           It "may" occur, not even will occur, shall occur, we  
22      intend to take this action immediately, none of that language  
23      is present.

24           THE COURT: I think one of the things I have to  
25      consider is would an unsophisticated person who reads that

1 believe that on the day following the expiration date they  
2 could get a foreclosure suit filed against them, and you take  
3 the position that even an unsophisticated person who reads that  
4 would not come to that conclusion?

5 MS. ACCARDI: I would, Your Honor. I think -- to that  
6 conclusion, it's -- you have to give meaning to the words there  
7 included, and I think under the least sophisticated consumer  
8 standard, even -- I think it's the -- I think it's the Clomon  
9 case out of the Second Circuit states that, "The least  
10 sophisticated consumer is presumed to have a rudimentary amount  
11 of information about the world, and a willingness to read a  
12 collection notice with some care."

13 I think that's what it comes down to, is they have to  
14 read it with some care. Some care, if you read it, even just  
15 that one singular line, it's going to say, we may take this  
16 action, or we may not. I think both of those are equally  
17 available, and understanding terms, it doesn't state a present  
18 intention to do anything is really the key thing there, Your  
19 Honor.

20 THE COURT: Okay. Thank you.

21 MS. ACCARDI: Sure.

22 Then I also wanted, and I think I also previously  
23 mentioned, the Madura case. That is an Eleventh Circuit case,  
24 and in that one the Court held that indicating a matter may be  
25 referred to an attorney if payment is not made is not a

1       deceptive practice.

2           And I think that one is -- well, I know the Eleventh  
3       Circuit hasn't, obviously, ruled on this specific issue. That  
4       is pretty close in the fact of the unequivocal or the  
5       distinction between equivocal and unequivocal language, right,  
6       that may refer to an attorney was not actionable under the  
7       FDCPA.

8           Additionally, I think that kind of probably covers my  
9       argument with regards to whether there was a threat made.

10          I will say the default notices, like I said, simply  
11       state an intention that, you know, acceleration may result,  
12       which is very -- will result, honestly, if the default was not  
13       resolved within the time period allowed for, that would happen.  
14       That's, obviously -- you know, unfortunately, Selene does  
15       foreclose on borrowers to the extent that they don't bring  
16       their loans current. That is legally permissible, you know,  
17       under the terms of the mortgage, a step that Selene can take if  
18       certain conditions, obviously, are not met by the borrower.

19          I think that would cover that, Your Honor.

20          I would move to the false representation. So, really,  
21       under the FDCPA this would be 1692(e)(10), excuse me, and that,  
22       again, I think -- the plaintiffs, I think, rely on a host of  
23       cases, none of which are really in the persuasive authority,  
24       none of which are in Florida.

25          Most of them are, it looks like, Seventh District,

1      Seventh Circuit and Ninth Circuit, going to whether the  
2      threats, purported threats included are legally cognizable, so  
3      whether Selene could actually accelerate these loans.

4            And most of the case law I think relied upon by the  
5      plaintiffs state the opposite. Really, it's -- a lot of these  
6      cases -- the Ruth case out of the Seventh Circuit threatened to  
7      share plaintiffs' information when the creditor was barred from  
8      doing so pursuant to statute.

9            So, objectively, the creditor could not take the action  
10     that they were purportedly threatening to take.

11           The same thing in the Gonzalez case, Your Honor, and in  
12     that the Ninth Circuit threatened to report on a debtor's  
13     credit when it was legally barred from doing so, and then the  
14     Haddad case out of the Northern District of Illinois threatened  
15     to continue to incur charges when charges were not legally  
16     permissible to be added to the account under the contract  
17     terms.

18           So, I think that that portion of it, and in terms of  
19     the false representation, paragraph 22 of the mortgage  
20     specifically provides that if the default is not cured on or  
21     before the date specified in the notice, a lender, at its  
22     option, may require immediate payment and all in full of all  
23     sums secured by the security instrument and may foreclose.

24           And then Section 6C of the note states that, "The note  
25     holder may send written notice, and if the borrower does not

1 pay the overdue amount by a certain date, the note holder may  
2 require the borrower to pay immediately the full amount of  
3 principal which has not been paid, plus interest."

4 So, pursuant to the terms of the mortgage, Selene does  
5 have the legal authority to accelerate on loans once they go  
6 into default.

7 Then I will skooch on, Your Honor, to Section 1692f of  
8 the FDCPA, that's kind of the catchall provision. That's  
9 another cite, I believe the third count of the complaint.

10 Pursuant to that provision, Your Honor, "A debt  
11 collector's act in collecting a debt may be unfair if it causes  
12 injury to the consumers that is substantial, not outweighed by  
13 countervailing benefits to consumers, and not reasonably  
14 avoidable by the consumer."

15 A few things to unpack there, Your Honor.

16 I think if it causes -- so, that -- excuse me, I didn't  
17 quote. That's the Bryant case out of the Southern District,  
18 Your Honor.

19 First thing I think would be causes injury to the  
20 consumer. That will be brought up and I will talk about that  
21 more when we discuss the negligent misrepresentation claim,  
22 Your Honor, but there is really no actual damages here that are  
23 alleged that are recoverable, so I think that portion of the  
24 injury portion would be lacking here.

25 Again, with the substantial in terms of proving this

1 claim, it has to be a substantial injury. I mean, I think  
2 that -- it's alleged in the complaint all these debtors that  
3 are at issue allege -- they admit that they were in debt,  
4 excuse me in default of their loan obligations, and they don't  
5 deny that they owe this money. So, I think, whether they  
6 actually paid as a result of the default notice or did not, I  
7 don't know how you're claiming a substantial injury when they  
8 were otherwise legally obligated to pay sums.

9 And there have been no allegation that any of the  
10 default notices have inaccurate amounts or charges or anything  
11 to that effect.

12 THE COURT: I didn't catch that before, so you're  
13 saying 1692f has as an element that there has to be an injury?

14 MS. ACCARDI: That's -- per the Bryant court out of the  
15 Southern District, yes, Your Honor, the Court held that a debt  
16 collector's act in collecting a debt may be unfair if it causes  
17 injury to the consumer that is substantial, not outweighed by  
18 countervailing benefits and not reasonably avoidable by the  
19 borrower.

20 THE COURT: All right. Bryant, I will go look at that  
21 case.

22 MS. ACCARDI: Sure.

23 I can give you the citation if that's easier, Your  
24 Honor.

25 THE COURT: Do you have it?

1 MS. ACCARDI: I do, yes. It's 2017 WL 2955532.

2 THE COURT: Okay. Great, thank you.

3 MS. ACCARDI: And I think wrapping that one up, the  
4 third element, not reasonably avoidable by the consumer,  
5 obviously, in this situation, had the borrowers remained  
6 current on their loan obligations a default notice would have  
7 never been sent to them.

8 Then the second portion of the analysis of the 1692f  
9 claim would be whether the conduct that is alleged with regards  
10 to the 1692e claim is separate and apart from the conduct that  
11 is alleged with regard to the 1692f claim.

12 The Miljkovic -- I probably messed that up, sorry, Your  
13 Honor -- out of the Middle District -- I will give you the  
14 citation since I can't say that name.

15 THE COURT: That's fine. I have that one already.

16 MS. ACCARDI: Thank you. I probably got it very wrong.

17 The Middle District stated there that a complaint will  
18 be deemed deficient under 1692f if it does not identify any  
19 misconduct beyond which the plaintiffs assert violate other  
20 provisions of the FDCPA.

21 The default notices form the basis for all of the  
22 plaintiffs' claim under the FDCPA here, and, so, for that  
23 reason, I think the 1692f claim would fail since it doesn't  
24 allege this separate conduct.

25 That same court, Your Honor, held that in order to

1 proceed under the 1692f, the appellant is required to allege  
2 facts shown that the least sophisticated consumer would or  
3 could view the subject conduct as partial and unjust or as  
4 unscrupulous and unethical. So, these additional allegations  
5 would need to be present, and additional facts supporting them  
6 would also need to be present.

7 THE COURT: Can you give me an example of -- what type  
8 of practice would qualify as a subsection F practice that would  
9 not also be a subsection E practice?

10 MS. ACCARDI: I think, Your Honor, it would have to be  
11 -- so, unscrupulous or unethical I think that that could be one  
12 where -- if you -- I have seen some of these cases where people  
13 would get on the phone and tell them you need to contact your  
14 family to pay this debt off, if you don't do that then we're  
15 going to immediately foreclose on your home when they have no  
16 right to foreclose on their home, so I think the conduct is  
17 obviously ratcheted up a bit is what I've seen.

18 THE COURT: I just want to understand conceptually how  
19 the statute works.

20 So take that example, someone writes a -- a bill  
21 collector writes a letter saying we are going to foreclose on  
22 your home. They have no right to foreclose on your home.  
23 Obviously, that's an E claim.

24 MS. ACCARDI: Correct.

25 THE COURT: And then the plaintiff pleads it as an F

1 claim as well and says it's an unfair, unethical practice. You  
2 say the F claim has to be dismissed because it's already plead  
3 as an E claim.

4 MS. ACCARDI: Well, I mean, I think regardless it would  
5 be duplicative, right. So they couldn't recover under both,  
6 and I think it would be that additional conduct of what was the  
7 manner in which that statement was made, you know, did he call  
8 friends and family when he did it, you know, things of that  
9 nature that would draw it out of just the E category and kind  
10 of make it a separate -- not only was it potentially a false  
11 threat, but the manner in which it was provided was unethical  
12 or unscrupulous.

13 THE COURT: Okay.

14 MS. ACCARDI: I now move on to the FCCPA claim, Your  
15 Honor.

16 For that one, under the section alleged, which is 15 --  
17 excuse me, 55972, subsection 7, "Courts will consider whether a  
18 practice is abusive or harassing as they consider the frequency  
19 of the contract, the legitimacy of the claim, the creditor's  
20 claim, the plausibility of the debtor's excuse, and the  
21 sensitivity or abrasiveness of the personalities.

22 That's the Brown case out of the Middle District tells  
23 that.

24 The Middle District in Savage found that that the  
25 plaintiffs failed to state a claim under 559.7227, where the

1 subject letter stated foreclosure proceedings would not be  
2 commenced until allowed by applicable law.

3 So, I think that would be a key distinction that is not  
4 quite before the Court I guess at this point, Your Honor, but  
5 something that could come into play. And I think also for the  
6 reasons that we've already discussed regarding the FDCPA, as  
7 I'm sure Your Honor knows, they go hand in hand, so I think the  
8 FCCPA claim would also fail for -- the separate reason, really,  
9 is that the claims alleged are not abusive or harassing because  
10 they don't fall within the parameters that are really set forth  
11 under the FCCPA claim.

12 There is no claim that, you know, we sent, you know,  
13 20 million letters to the borrowers or anything to that effect,  
14 or claim, you know, that the debt amounts included in the  
15 letters was illegitimate or not founded or things of that  
16 nature.

17 THE COURT: Okay.

18 MS. ACCARDI: Lastly, the negligent misrepresentation  
19 claim, Your Honor, I will go straight to the point for that  
20 one.

21 Critical and actual injury is an element of negligent  
22 misrepresentation. The Saltero case out of the Southern  
23 District held that if no harm is shown, an action for negligent  
24 misrepresentation fails on the merits.

25 In this case, Your Honor, plaintiffs failed to

1 demonstrate that they suffered an actual injury due to the  
2 alleged misrepresentations. They just really boldly assert  
3 that they suffered some financial damage and injury or that  
4 they had an informational injury. However, the Court in  
5 Barilla held that the plaintiffs were alleged that they were  
6 injured by satisfying their contractual obligations.

7 The Court is aware of no case law to support that  
8 contractually owed payments are actionable losses within the  
9 meeting of Florida negligent misrepresentations law.

10 THE COURT: What are the damages available under the  
11 statute, by the way?

12 When someone wins one of these, under the FDCPA, what  
13 do they get?

14 MS. ACCARDI: I think it depends on the avenue. In  
15 this case, Your Honor, from my understanding, statutory damages  
16 is one availability, and then actual damages would be kind of  
17 depending on the violation, Your Honor. So, if they paid  
18 amounts that were not due and owing, so in the situation that  
19 they are claiming that the default notice had the wrong amount  
20 and they claim -- and they paid that amount and then they could  
21 have had interest on that amount kind of thing, that, I think,  
22 would be an actual loss that would be cognizable under the  
23 statute.

24 Pain and suffering to a certain extent is available,  
25 obviously difficult to prove I think, Your Honor.

1                   And I think that that would be kind of the main ones.

2                   Here, again, it's mainly just -- plaintiffs have  
3                   described their injuries as informational injury, that they  
4                   might have taken different actions had they had more  
5                   information, not that they even really definitively took any  
6                   action on the default notices at all.

7                   THE COURT: Okay.

8                   Do you know, does Florida law allow nominal damages for  
9                   a negligent misrepresentation case?

10                  MS. ACCARDI: Not to my understanding.

11                  No, Your Honor, I think based on my understanding of  
12                  the Soltero case, that's a Southern District case but, again,  
13                  you have to have harm shown, and I think -- yeah, the Williams  
14                  case out of the Northern District of Alabama says, "In the  
15                  absence of an actual injury resulting from the debtor's  
16                  reliance on the, you know, on the misrepresentations, they  
17                  cannot establish a prima facie case for negligent  
18                  misrepresentation."

19                  So, I think you would have -- not all damages would be  
20                  sufficient. You would have to prove some amount of actual  
21                  injury, whether it's nominal amount, you know, mailing, if  
22                  sometimes if you had to send in mailing notices, things like  
23                  that. You could recover postage, things of that nature, but  
24                  you would still have to prove that.

25                  THE COURT: Okay. All right. Is that it?

1 MS. ACCARDI: That's it, Your Honor.

2 THE COURT: All right. Mr. Maginnis.

3 MR. MAGINNIS: Thank you, Judge. I will try to mirror

4 Ms. Accardi's arguments for ease of the Court.

5 First, starting with what she wrapped up in response to  
6 some of your questions, the immediacy piece in the cases  
7 involving "may." The "may" cases -- there are two issues for  
8 the Court to be aware of. One, we have the LeBlanc case in the  
9 Eleventh Circuit where the Eleventh Circuit found in a letter  
10 that said, if you don't pay -- and I'm paraphrasing, of  
11 course -- you may refer this to an attorney to consider whether  
12 the attorney would want it.

13 The Eleventh Circuit found exactly what the Court was  
14 alluding to in the beginning, which is, the least sophisticated  
15 consumer might view that as a threat that they're actually  
16 going to file the suit, but it's not just that. That's one  
17 aspect of the matter.

18 With "may," and Ms. Accardi said it, what may has to  
19 mean is, we may or may not, and both of those imply that you  
20 can. You can, you just may or you may not. You can be  
21 benevolent or you can make a business decision to do it or not  
22 do it, and our whole point is that they can't and they don't.

23 And we believe that the evidence -- we plead that they  
24 can't and they don't, and we know the evidence is going to show  
25 that they can't and they don't.

1                   So, "may" is just as harmful in that because what it  
2    does is that it has the borrower think, okay, I'm right on the  
3    edge of the cliff. If I don't meet this deadline, I will have  
4    to either come up with this money that I'm struggling to have  
5    or I'm going to have to reach out to them and do some sort of  
6    loan mod, and the negotiation is really strongly in their favor  
7    at this point, when the reality is they are not at the edge of  
8    the cliff. They have time. They can tread water and remain 30  
9    to 60 days behind forever.

10                  They can get their act together and get caught up, and  
11    they have months to do that because federal law protects them,  
12    and Ms. Accardi was very careful to say, "under the terms of  
13    the mortgage we can do this," and that's because under federal  
14    law they can't. And they know that.

15                  THE COURT: Because they have to wait for the 120 days.  
16    Is that your point?

17                  MR. MAGINNIS: Correct. Correct, on a federally backed  
18    mortgage, RESPA says you cannot refer the matter for  
19    foreclosure until you are 120 days past due, which means,  
20    mortgage is due on January 1st. February 1st -- they send the  
21    letter out February 15th. If you make any payment to cover  
22    January, you are no longer January past due, now you are  
23    starting from February, and you have to be four months straight  
24    in arrears before they can refer it to an attorney for  
25    foreclosure. So, this "under the terms of the mortgage" is

1       false and that's the whole point. They want to state it's the  
2       reality of the situation, but it's not.

3                 The Moore case is another one that goes into it with  
4       that disclaimer, and, again, we would be fine with the whole  
5       letter coming in, Judge, because it doesn't have that  
6       disclaimer in it. The Moore -- and, certainly, what's in front  
7       of the Court doesn't have that disclaimer.

8                 The Moore case, it's Eleventh Circuit, and so, we -- I  
9       don't think it's a correct decision. Basically, what it found  
10      was the borrower -- if you put in an as allowed by law, the  
11      borrower should have an understanding of what the laws  
12      regarding foreclosure are such that they could understand  
13      pieces of the letter, which certainly doesn't sound like the  
14      least sophisticated consumer to me, but it is the Eleventh  
15      Circuit law but it doesn't apply here. There is no  
16      disclaimer --

17                 THE COURT: The only reason it doesn't apply is because  
18      this letter doesn't have that extra language.

19                 Right?

20                 MR. MAGINNIS: As to the foreclosure piece, and what  
21      the Barilla court found in the Seterus case, which obviously  
22      Seterus has that language, is they said, well, that disclaimer  
23      doesn't apply to acceleration either, so it doesn't apply for  
24      two reasons.

25                 THE COURT: By the way, while we are on that point, she

1 gave me the mortgage documents, which are not attached to your  
2 complaint. I can consider them as long as you don't dispute  
3 their authenticity.

4 Do you dispute the authenticity of the documents she  
5 attached to her motion to dismiss?

6 MR. MAGINNIS: I don't know of any basis to dispute it.  
7 As far as I know, they were pulled from the public records, and  
8 counsel is right that they are publicly available, and these  
9 are uniform instruments.

10 THE COURT: All right. I appreciate the candor.

11 Keep going.

12 MR. MAGINNIS: Yeah, that would be -- winning that way  
13 would not be the way to win because I would just lose next  
14 week. So, no, we are happy for the Court to consider it.

15 So that's the crux of it, right, it's that the  
16 statements are misrepresentations regarding their rights.  
17 Specifically, just reading from the letter, and I will only  
18 stick to the first page, failure to cure the default --  
19 "failure to cure the default on or before the date specified  
20 may result in acceleration of the sum secured, sale of the  
21 property, and/or foreclosure."

22 That statement could be true if the date specified they  
23 used was an accurate description of their rights. They needed  
24 to change the date specified for that to be true, because the  
25 date that they used, one that leaves you 80 days past due, if

1       you pay nothing would not result in acceleration, would not  
2       result in sale, would not result in foreclosure, any of those  
3       three.

4               And moreover, if you make a payment during that time  
5       period, you're not 80 days past due, you're back to 30 or 60.  
6       So the statement that you must pay all the amounts due under  
7       the terms of your note and security instrument by this date,  
8       that you must cure your default by this date, or else it "may"  
9       result in acceleration of the sum secured in the sale of the  
10      property and foreclosure, it may not. They cannot do that.

11              So, you know, that's -- on the same page, again, and it  
12      continues, "If you are not cured within 35 days of this notice,  
13      Selene, at its option may require immediate payment in full of  
14      all sums secured by your security instrument --" a/k/a  
15      accelerating, "-- without further demand or notice, and  
16      foreclose the security instrument.

17              That's not true based upon the deadline that they  
18      provide. So, that's the crux of the claim.

19              1692e(5), "Actions that cannot legally be taken are  
20      false representations."

21              We think if the allegations -- if we prove the  
22      allegations that are in our complaint, plainly, they are doing  
23      things that cannot legally be taken and they are making false  
24      representations regarding their rights. The's the e(10).

25              The F claim, I'm not -- well, nowadays you have to

1 prove a harm, anyway, because you got to have standing on  
2 behalf of the individual plaintiffs, but I am not aware of any  
3 sort of implicit additional requirement associated with 1692f.

4 I think the Court hit the nail on the head on what  
5 1692f typically is, is it's a catchall, such that if you have a  
6 technical problem with your E claim but you have unfair and  
7 unconscionable activity such that eventually, if you your E  
8 claim is unsuccessful you have to resort to the F claim, that's  
9 typically how it plays out. And that's why it would be  
10 inappropriate to dismiss the F claim at a motion to dismiss  
11 stage.

12 It may well be that ultimately the F claim is redundant  
13 because the E claim moves forward, or it may be, Selene, of  
14 course, can defend the case, and there is case law that says,  
15 if you lose on the E claim and you don't have anything in  
16 addition to that that would support your F claim, well, then  
17 you lose the F claim. That's the motion to dismiss.

18 But what the Court did in Barilla, is they said, that  
19 doesn't mean the contrary, which is that the F claim is  
20 automatically superfluous at the motion to dismiss, because  
21 guess what happens, the F claim loses and then if they find a  
22 technical gotcha on E claim, then you don't have the F claim as  
23 the backup. So it may be that down the line this is only  
24 litigated based on these misrepresentations, these false  
25 misrepresentations, but the catchall is there for a reason.

1                   The Miljkovic case that was referenced -- I'm sure I  
2 butchered the name too -- the Court rejected that in the  
3 Barilla case for exactly that reason. They said, it does not  
4 mean that what it is is that if you have any F claim that  
5 relies on the same facts of the E claim the F claim loses.  
6 But, the contrary, if your E claim loses, then your F claim  
7 doesn't survive, if the facts are the same.

8                   And we agree, our basis that it's unfair and  
9 unconscionable is because they misrepresent their rights.

10                  THE COURT: Can you give me an example of what would a  
11 true F claim be that's really different than an E claim?

12                  MR. MAGINNIS: Like I said, I think it's if you find a  
13 technical deficiency. So, say you're pursuing a false  
14 misrepresentation claim and they establish that in some  
15 universe it could be perceived as technically true, but it's  
16 still unfair and unconscionable and induces borrowers to do  
17 things that they would never do if they fully understood it,  
18 that could be a claim where the representation is not false but  
19 it's still claimed fair.

20                  It's like in the state the FDUTPA claims are and the  
21 other state law claims where you have an unfair and deceptive  
22 trade practice, something can be deceptive but even if it's not  
23 deceptive it can be unfair.

24                  I can't think of a specific case off the top of my head  
25 or fact pattern because usually it's a catchall but that's the

1 situation is if you have some law in your E argument but you  
2 have bad behavior.

3 THE COURT: Okay.

4 MR. MAGINNIS: The Florida claim -- as counsel noted, a  
5 lot of this is because they stand on top of each other and so  
6 they believe that if the FDCPA claim survived the FCCPA claim  
7 survives. In the Savage case, which is also a Seterus case,  
8 the Court did dismiss the Florida claim but, again, based upon  
9 that disclaimer that was from that Moore case.

10 It's important to think about that under 559.727 where  
11 it's abuse and harassment, abuse and harassment includes  
12 telephone -- it's the situation where you're calling on the  
13 phone 20 times a day. That's inclusive, but that's not all  
14 abuse and harassment covers under that statute. It's a little  
15 bit broader than you might think of it using the term in  
16 everyday conversation.

17 For example, Weaver versus Wells Fargo, which is in our  
18 brief, they violated 559.727 when they contacted plaintiff  
19 about a mortgage debt that the plaintiff had no obligation to  
20 pay. We think that's very similar.

21 The Gaalswyk case that we also cite in our brief,  
22 allegations met 559.727, where a debt collection notice says  
23 misstatements statutory obligations of the debt collector.

24 So, I think the difference between the Florida claim  
25 and the FDCPA claim is if we got to a jury on the FDCPA claim,

1       they'd have -- if it's an FDCPA claim, if they did it's  
2       (indiscernible) liability.

3               In the Florida claim, they'd have to find that they did  
4       it and that it constituted harassment, whatever was proved to  
5       have happened.

6               But they largely overlap each other so my arguments are  
7       largely the same. They're misrepresenting what their rights  
8       are to the detriment of consumers.

9               Negligent misrepresentation, I think the Court hit the  
10       nail on the head regarding potential nominal damages. This  
11       comes up all the time. Injury and harm are not the same as  
12       damages. That's why you have nominal damages.

13               So, we believe we have properly plead that there are  
14       harms, and it's not a situation where, well, you owe the money  
15       anyway so you can't be harmed by misrepresentations because you  
16       have the time value of money. Again, these borrowers, if they  
17       had been properly informed as to what their rights are, had an  
18       opportunity to make optimal decisions regarding their finances  
19       instead of optimal decisions regarding their finances.

20               And we believe we will prove and have plead that these  
21       individuals were harmed in the sense that they relied upon the  
22       information there and they made decisions to their detriment.  
23       Emotional distress is also a potential viable claim under that  
24       as well, and if ultimately it was determined that they were  
25       harmed, but we didn't put a dollar value on it, then you're

1 right, it (indiscernible).

2 I'm not aware of any case law that went that far.

3 Ultimately, this case is largely going to be about the  
4 statutory damages because we plead it as a class action, and  
5 individualized damages make it very difficult to do a class  
6 action.

7 But we do think the claim is viable, well plead, and  
8 honestly, we believe we will have the evidence to get through  
9 summary judgment and move towards a trial on that issue.

10 THE COURT: This isn't before me today, but how would  
11 you get your fraud count into a class?

12 How would you certify on the fraud count, individual  
13 issues there?

14 MR. MAGINNIS: Good question. So, it depends on our  
15 offer of proof. So, to have a fraud claim you got to show  
16 misrepresentation, and that's uniform, and then you do have to  
17 show reliance and that's often not uniform. But what you do --  
18 you can show reliance on a class-wide basis through  
19 circumstantial evidence, so what we would do is we would ask  
20 the trier of fact to say, hey, what happened to Ms. Cruz, what  
21 happened to the Martins, they read this letter just like  
22 everybody else in the class would. They understood it just  
23 like everybody else in the class would. They relied on its  
24 true veracity just like everyone in the class would, and you  
25 are entitled to find that on a class-wide basis the class

1 relied on the letter to their detriment.

2 THE COURT: So you can do it.

3 All right. That's not really before me.

4 MR. MAGINNIS: Okay.

5 THE COURT: All right. I think that was -- I think  
6 that's all the questions I had.

7 Let me bounce it back for rebuttal, if you have any.

8 MS. ACCARDI: Just very briefly, Your Honor. I think  
9 with regards -- the first kind of argument that Mr. Maginnis  
10 started with with regards to just kind of -- whether the  
11 language in the notice is fair or not, I think he continues to  
12 go back to on day 36, you know, the day immediately after the  
13 payment due date, we were not, pursuant to federal law or  
14 pursuant to Selene's practices, as it's plead in the complaint,  
15 we do not accelerate loans on that day.

16 I think, again, we're reading into the notices  
17 provisions this immediacy that is not there. A, there is no  
18 indication as to when we are going to take any action, and  
19 certainly not a deadline or prescribed of, you know, we will  
20 accelerate it on this day. That's not there.

21 I think that is the ultimate crux there, Your Honor, is  
22 that we are -- and pursuant to the terms of the mortgage and  
23 federal law, able to accelerate loans pursuant to the loan  
24 terms. It's just the notices of default -- we are reading into  
25 it that this is an immediacy argument, so I think that's the

1 key distinction, Your Honor.

2 I will go back to the Chalik case. I think that we  
3 talked about with regards to separate behavior for subsection  
4 F, and in that case, Your Honor, the Court held that the  
5 plaintiffs' 1692f claim is indistinguishable from their 1692e  
6 claim, and the law is well settled that one cannot rescue a  
7 defective 1692e claim through Section 1692f's catchall  
8 provision. So, therefore, they dismissed the 1692f provision.

9 THE COURT: Which one is that? Is that the M case?

10 MS. ACCARDI: I'm sorry, the Chalik 677 F.Supp 2d at  
11 1322.

12 THE COURT: Yeah, I remember that.

13 MS. ACCARDI: Finally, Your Honor, I think going back  
14 to the negligent misrepresentation claim really quickly, Your  
15 Honor, I think I had previously mentioned this, but I wanted to  
16 mention it if I did not. The Barilla case that's been  
17 mentioned a few times held that the plaintiffs alleged that  
18 they were injured by satisfying their contractual obligations,  
19 and the Court is aware of no case law to support the  
20 contractually owed payments are actionable losses.

21 And, again, injury is an element of negligent  
22 misrepresentation, so if you have not alleged an injury, in  
23 fact, you are going to fail on that claim, which is the case  
24 here, Your Honor.

25 THE COURT: Where are we on this case procedurally?

1       It's not my case, obviously, but this motion has been pending  
2       for a while. You guys have a class motion also pending?

3                   Is discovery stayed or is discovery going on?

4       MS. ACCARDI: Ongoing, Your Honor.

5       THE COURT: Okay.

6       MR. MAGINNIS: And almost complete, yeah.

7       MS. ACCARDI: Excuse me, it's complete.

8       MR. MAGINNIS: Well, you may recall, Judge, we were  
9       before you on the net worth issue where there was discovery  
10      relating to that and potentially reopening a 30(b)(6), and  
11      that, for the most part, is the last bit of discovery remaining  
12      in the case.

13                  THE COURT: I don't mean to hurt your feelings, but I  
14      don't recall that.

15                  MR. MAGINNIS: It wasn't a captivating argument? I'm  
16      surprised.

17                  MS. ACCARDI: We are not very memorable. That's okay.

18                  THE COURT: Tell me about your motion to strike the  
19      jury demand.

20                  MS. ACCARDI: Sure, Your Honor, let me pull out my  
21      outline on that one.

22                  I will try to be brief on this too, as much as I can,  
23      since I know we are running out of time.

24                  Both mortgages, as Your Honor is aware, have a jury  
25      trial waiver provision in them. The Martins, the plaintiffs

1 signed directly under the waiver provision, and then Ms. Cruz,  
2 the other named plaintiff, initialed on the page that contains  
3 the jury trial waiver.

4 Both loans at issue are owned by the same investor and  
5 both are, obviously, serviced by Selene, as the loan servicer  
6 and attorney, in fact, for the owner. And we have submitted to  
7 the Court, attached to our motion to strike and then our reply,  
8 powers of attorney evidencing that agency relationship.

9 THE COURT: Let me ask you this; do you believe your  
10 client gets the benefit of the jury trial waiver by the mere  
11 fact of the agency relationship, or is there something specific  
12 in this power of attorney that I should focus on that really --  
13 is there some magic language in the power of attorney or is it  
14 the mere agency relationship itself?

15 MS. ACCARDI: I think -- I mean, the powers of attorney  
16 does set forth what powers like Selene has pursuant to their  
17 power of attorney. There is some, I guess, if you want to call  
18 it magic language in the power of attorney that states that  
19 Selene -- excuse me, that U.S. Bank is empowering Selene with  
20 the authority to enforce the terms of the security instrument.  
21 So I would think, honestly, just pursuant to that, Your Honor,  
22 that if we are empowered with the ability to enforce the terms  
23 of the security instrument on behalf of U.S. Bank we can  
24 enforce the terms of the jury waiver provision.

25 THE COURT: Where is that?

1                   I looked for language like that. All I see is that  
2    they have the power to execute and acknowledge in writing  
3    documents customarily used to do the following ten things, and  
4    then it gives a list of ten things. But technically, all this  
5    document does is give your client power to sign documents on  
6    behalf of the principal, I believe, unless you tell me  
7    differently.

8                   MS. ACCARDI: Yeah, I think it sets forth a host of  
9    obligations, Your Honor. I think -- I mean, like, the first  
10   paragraph we can demand, sue, recover for fees and things.  
11   Basically, really, I mean, it is a pretty exhaustive list and I  
12   don't have highlighted in here, you know, I should have, where  
13   I took that language from, Your Honor. But it really empowers  
14   Selene to act in U.S. Bank's interest and act in their place as  
15   their agent, as you would imagine any agency principal, is any  
16   action that U.S. Bank could take on behalf of enforcing the  
17   security interest, they are providing that to Selene to act in  
18   their stead is really what it is.

19                   I will look through here, Your Honor, and I will --  
20    after this, if I can, I can highlight it and send it to Your  
21    Honor. I don't think I would have taken it -- I have it in  
22    quotes in my notes, so I think I must have pulled it -- I just  
23    can't find it at the very present moment.

24                   THE COURT: I'm fine if you find it before the end of  
25    the hearing. If you don't, within 24 hours just do a

1 supplement on what page and where it says that.

2 Do you have any other argument?

3 MS. ACCARDI: Oh, yes, I do.

4 So, I think going to -- there is a couple of things  
5 here, Your Honor. First would be courts that have upheld the  
6 validity of an identical jury trial waiver provision like this.

7 The Acciard case out of the Middle District noted that  
8 an identical provision was identified as a bold-faced heading,  
9 set forth a separately numbered paragraph contained in the  
10 loan, in the mortgage, excuse me.

11 Same thing in the Murphy court, Your Honor, out of the  
12 Middle District found an identical jury trial waiver provision  
13 to be enforceable. So I think just the fact that the jury  
14 trial waiver was entered into knowingly and conspicuously would  
15 say that it is valid in that respect.

16 With regards to whether the claims alleged here relate  
17 to the mortgage sufficiently to kind of call that jury trial  
18 waiver into issue, the Middle District in the Levinson case  
19 held that the defendant's alleged behavior in violation of the  
20 FCCPA was due to the plaintiffs' failure to pay as  
21 contractually obligated under the mortgage, and found that the  
22 waiver applied to actions arising out of debt collection  
23 activity because it was foreseeable when the parties executed  
24 the mortgage that the defendant would engage in debt collection  
25 practices. Therefore, at least in the Levinson case there,

1 Your Honor, they found the jury waiver provision to apply to  
2 FCCPA claims.

3 There is a host of other case law out of Florida that  
4 follows suit. The Newton case out of the Middle District held  
5 that a TCPA case fell within the jury trial waiver provision.  
6 The Foley case out of the Southern District particularly, Your  
7 Honor, held that, "While plaintiffs' claim for violation of  
8 TILA likely does not arise out of the loan documents, the Court  
9 concludes that the in-any-way-related-to provision of the jury  
10 trial waiver does encompass the instant action."

11 Then on the Martorella case, also out of the Southern  
12 District, Your Honor, held that the plaintiffs' FCCPA claim  
13 arrive from collection activity from amounts due under the  
14 mortgage and the note that she executed and, therefore, were  
15 applicable to her FCCPA claim.

16 And we cited a bunch of other cases, Your Honor, out of  
17 Florida that hold that FDCPA and FCCPA claims do relate  
18 sufficiently to the terms of the mortgage to allow the jury  
19 trial waiver provision to come into play.

20 THE COURT: Okay.

21 MS. ACCARDI: Then -- I think we can turn to the  
22 standing issue, Your Honor, which I think is what you had  
23 already basically touched on.

24 The case law on this one, I will say, is important to  
25 know the details I think is the big thing.

1                   So, the first case I'll mention is the Hamilton case  
2 out of the Southern District. In that case, Your Honor, the  
3 Court held that an exception to the rule exists for agents of a  
4 party to a contract where a principal has signed a contract  
5 containing a jury waiver clause, its agents may also enforce  
6 the waiver with regard to claims arising from acts taken within  
7 the scope of their agency.

8                   Again, the Charles case also out of the Southern  
9 District, Your Honor, affirms that point, and they said that  
10 here, like in Hamilton, the plaintiff alleges that SPS was  
11 hired to service the loan and that SPS is an agent of the loan  
12 owner.

13                  I will note here, Your Honor, that same allegation is  
14 included in our complaint that Selene services both of these  
15 plaintiffs' loans. So at a minimum, even with that allegation,  
16 taking the allegations of the complaint as true, that Selene is  
17 the servicer of these loans.

18                  And the Court in Charles also mentions, basically kind  
19 of like a circumstantial evidence of the servicing relationship  
20 would be the actions that SPS took that were alleged in the  
21 complaint, they are loan servicing actions. Similar loan  
22 servicing action are alleged in our complaint, the fact that  
23 Selene accepts payments. We sent the default notices on behalf  
24 of the owner of the loan to collect the debt.

25                  The same thing, all of this evidence is this agency

1 relationship, even apart from the powers of attorney that we  
2 have submitted to the Court, which is, obviously, direct  
3 evidence of the agency relationship.

4 Then, finally, the Costello case also out of the  
5 Southern District, Your Honor, relied on Hamilton, relied on  
6 Charles that I just mentioned, and indicated that in carrying  
7 out its obligation to service the loan consistent with the  
8 terms of the mortgage, defendant effectively acquired the  
9 rights and obligations of the lender. Indeed, the mortgage  
10 contract, itself, contemplates the direct involvement of the  
11 loan servicer. Accordingly, I find that the defendant as an  
12 agent of the lender is entitled to avail -- in this situation  
13 it's a presuit notice requirement, but basically entitled to  
14 avail itself to enforce the terms of the mortgage.

15 So, all of those cases out of the Southern District,  
16 Your Honor, stand for the proposition an agent of the loan  
17 holder can enforce the terms of the mortgage, including the  
18 jury trial waiver, and I will leave it that.

19 THE COURT: All right. Mr. Maginnis.

20 MR. MAGINNIS: So, it's a mixed bag of case law, Judge.  
21 We think our cases are more recent and more detailed, and we  
22 think that's for a reason. The cases -- there is even cases  
23 where the courts find in favor of the plaintiffs where the  
24 Court says, well, I asked the defendant how you might be an  
25 assignee or you might be an agent, they couldn't come up with

1 any evidence to support it so I'm going to deny it.

2 I think there is in some instances a fundamental  
3 misunderstanding of what loan servicers do. The Costello case  
4 that counsel just mentioned is an example. The Court right  
5 there in carrying out its obligation of servicing the law, they  
6 effectively acquired the rights and obligations of the lender.

7 That is not right.

8 Lenders -- a lender lends, makes a loan. It is a  
9 generally securitized and sent in a package to, and purchased  
10 by a successor in interest asset, who is a single purpose asset  
11 who only owns portfolios of loans, which then assigns the owner  
12 a right to a bank like U.S. Bank.

13 So, in this case --

14 THE COURT: I'm sorry.

15 MR. MAGINNIS: -- there is an original lender, there is  
16 a successor in interest, which is a trust, and then there is an  
17 assignee of an owner, which is U.S. Bank. And Selene is just a  
18 contracted party to perform certain tasks. This is not  
19 subrogation, and I think courts often misunderstand that. They  
20 think that they basically are unified and are the same as  
21 servicer and owner. They are not. That's why they need a  
22 power of attorney to do anything.

23 The Hamilton case which they mentioned is doctors  
24 working for a hospital. That's not the same thing as this.

25 So, the mortgage doesn't give them any of this. The

1 mortgage talks about lenders, assignees, successor in interest,  
2 and in some cases sounds like that gets it done. It doesn't  
3 sound like Selene is arguing that. They even admitted in their  
4 reply that they are not the lender, assignee, or successor  
5 interest.

6 THE COURT: Do you agree that the power of attorney  
7 makes the servicer an agent of the contracting party?

8 MR. MAGINNIS: Definitely not. I mean, the power of  
9 attorney -- as the Court noted, I was prepared to point out  
10 that I have no idea what they are relying upon in the power of  
11 attorney to invoke the jury trial waiver.

12 The power of attorney is for Selene to assist U.S.  
13 Bank, not the other way around. It's not for Selene to get the  
14 benefit of U.S. Bank. That's not what an agency relationship  
15 does. You're acting on behalf of your back. This isn't the  
16 situation where, for example, there is a quiet title case,  
17 where they are trying to eviscerate the note and the mortgage  
18 and the property interest. U.S. Bank is not involved in this.  
19 If there is a relief against Selene, nothing happens to U.S.  
20 Bank and nothing happens to U.S. Bank's mortgage.

21 There is nothing in the power of attorney that provides  
22 benefits to Selene to exercise U.S. Bank's rights separate and  
23 apart from the contracted job. An agency -- we always are on  
24 the other side of this, Judge. Plaintiffs -- say in a personal  
25 injury case, plaintiff says, defendant employee acting in the

1 course and scope they're the agent, and the defendant says,  
2 whoa, whoa, whoa, this is not -- this is far outside of the  
3 specific agency rights that they have.

4 If, in fact, they are an agent, agency in Florida  
5 requires specific understanding of what rights they have to act  
6 on behalf of that, and they don't have it from the mortgage,  
7 and the POA doesn't say anything about it.

8 So, we don't agree that they are an agent in a way that  
9 they could enforce this jury trial waiver. They may act on it  
10 happening.

11 THE COURT: When these servicers -- when a servicer  
12 files a foreclosure case, is it called Selene versus Homeowner  
13 or is it called Bank versus Homeowner?

14 MR. MAGINNIS: Well, it's actually trustee. There is a  
15 contracted party whose job it is, and I hope I'm not misstating  
16 Florida law, but in every state I've been in, the trustee is  
17 ostensibly neutral. And it's the same thing, they are hired  
18 pursuant to the mortgage documents to do a job. They do not  
19 represent -- ostensibly, they are not supposed to represent  
20 either party. They're supposed to be neutral, but what this  
21 power of attorney does, and you saw it very explicitly in that,  
22 Selene can act on behalf of U.S. Bank to make that happen.

23 They can hire the trustee. They can refer to  
24 foreclosure. They can assist in that participation, because  
25 they're acting on U.S. Bank's behalf explicitly and

1 specifically.

2 So, I'd say they have an agency relationship to do  
3 that, but there is nothing in that power of attorney that gives  
4 them an agency relationship to invoke a jury trial waiver for  
5 themselves that has nothing to do with U.S. Bank. And then it  
6 comes back to the issue of waiver in and of itself.

7 So, the language in mortgages, the case law says,  
8 that's clear and conspicuous enough to constitute a waiver, but  
9 if the Court were to find that the power of attorney creates an  
10 agency relationship somehow -- and by the way, a power of  
11 attorney that didn't get executed until after this lawsuit was  
12 filed -- how on earth could a borrower have clearly understood  
13 that they were knowingly and voluntarily waiving their jury  
14 rights, waiving their constitutional jury rights not just to  
15 the lender, which is what it says in the note, but everybody  
16 who does work on behalf of Selene.

17 There is no way that clause says that. So, the only  
18 way you can get to agency is through this back doorway. Then  
19 you can't find that the plaintiffs waived their rights.

20 THE COURT: You seem to indicate that the Court would  
21 need an evidentiary hearing or something. I mean, is that your  
22 position that we would need to put people under oath and get to  
23 ask them questions about whether they understood what this  
24 meant or are you going --

25 MR. MAGINNIS: Well, I think the case law as to agency

1 often is a question of fact.

2 Now, if we're now using agency for a jury trial, is  
3 that a jury question or a bench trial question, that may be a  
4 legal research thing that everybody has to look into, but  
5 ultimately, courts have found based upon purely the language  
6 that the language, in and of itself, is fine, but if you -- if  
7 the only way you can allow them to enforce that at all is  
8 through this backdoor document that the borrower could never  
9 have known about, how on earth could that be a voluntary waiver  
10 of their rights? It's not in the document.

11 Loan services is a defined term in the mortgage, and if  
12 they wanted to waive a jury trial for loan servicers clearly  
13 and conspicuously, all they have to do is add the defined term  
14 that's already in there. They don't do it.

15 Then the other piece of this is either arising out of  
16 or relating to. The case law -- the Brinegar case that we cite  
17 to relating to in this context does not mean relating to in any  
18 way possible. That would subsume any case regarding a mortgage  
19 completely, and that's why in the Shallengburg case, the  
20 Thompson case, Williams, Hamid, these are cases where it  
21 involves consumer protection claims separate and apart from the  
22 mortgage, they found that even if the mortgage servicer had the  
23 right to invoke the jury trial waiver, it didn't relate to the  
24 mortgagor arise out of.

25 Relate to doesn't mean in any way they connected to.

1       That's not the standard that the Brinegar case talks about.

2           So, we believe that there is a lot of reasons why a  
3       jury trial waiver doesn't apply and, again, the agency piece of  
4       this, they're basing it on a power of attorney that was filed  
5       after the case was filed that doesn't say anything about jury  
6       trials. It's hard to believe that that meets the  
7       conspicuousness standard that's required.

8           THE COURT: Well, she did include another one in the  
9       record, I think, that covered the time period.

10          MS. ACCARDI: Correct, Your Honor. The one attached to  
11       our reply is executed in May of 2023.

12          MR. MAGINNIS: But not one that the borrower would have  
13       ever seen or had any knowledge or had been able to rely upon.

14          I mean, the case law is -- I'm not saying that we win  
15       this -- that the plaintiffs have won this a hundred times out  
16       of a hundred. It's a mixed bag, but we believe the analysis --  
17       the more deep analysis and more recent cases are in favor of  
18       plaintiff, particularly when you are talking about consumer  
19       protection cases.

20          And particularly when you are talking about this  
21       specific factual case, which has absolutely nothing to do with  
22       U.S. Bank, and I don't know how they could rely upon a power of  
23       attorney that invites them to act on behalf of U.S. Bank, when  
24       U.S. Bank has nothing to do with this case.

25          THE COURT: Okay. Rebuttal.

1 MS. ACCARDI: Sure, Your Honor, I think the first thing  
2 I will start with is there is a quite a few sister cases to the  
3 instant case, Your Honor, based on very similar, if not  
4 identical, default notices all filed against the lien in  
5 different jurisdictions also by Mr. Maginnis's law firm, one in  
6 the Northern District of Illinois as recently of July 18th,  
7 2024. An order is entered on a motion to dismiss that  
8 specifically found that Selene had standing to enforce the  
9 notice and cure provision of the mortgage.

10 So, at least the Northern District has found that  
11 Selene, as the loan servicer, has the authority and ability to  
12 enforce mortgage terms. So that would be, I think, obviously,  
13 a point of big -- we have filed a notice of supplemental  
14 authority providing the Court with that opinion since it was  
15 issued so recently.

16 And then, I think going to the cases I have previously  
17 cited, Your Honor -- I can go back and see if I can find the  
18 ones -- but most of them, if not all of them, did not have  
19 power of attorneys at issue and still permitted loan servicers  
20 to enforce jury trial waivers, despite the fact of not even  
21 submitting a power of attorney, just having the circumstantial  
22 evidence of the fact that they are the loan servicer and acting  
23 on behalf of the owner of the loan.

24 The Costello case that I cited, while I know  
25 Mr. Maginnis probably doesn't like it, it is the law in the

1       Southern District, Your Honor, so it does stand for the  
2       proposition that a loan servicer can enforce jury trial  
3       waivers.

4           Then going to, I think, the relating to language -- I  
5       wanted to go back to very quickly -- oh, most of the, I think,  
6       authority included in the plaintiffs' response was issued  
7       after, was issued -- some of it pre the Hamilton case that came  
8       out of the Southern District, Your Honor, that I mentioned,  
9       specifically the Hamid case that was brought up, there is no  
10      discussion of agency in that.

11           So, most of the case law, I would say, that the  
12      plaintiffs rely on do not discuss this agency portion. They  
13      just say, you are not a party to the contract, the mortgage.  
14      You don't get to enforce mortgage terms.

15           It's the Hamilton cases and its progeny that reference  
16      and bring up this agency relationship, and the fact that a loan  
17      servicer can and does enforce mortgage terms on behalf of its  
18      principal every day.

19           I will say, I do a fair amount of foreclosure work in  
20      Florida, and I can say that loan servicers do bring  
21      foreclosures in their own name all the time. And so it is also  
22      pursuant to these powers of attorney, there is good law in  
23      Florida saying that these powers of attorneys similar to what's  
24      been presented to the Court do provide loan servicers with the  
25      authority to foreclose, to collect payments.

1                   And I noted in this power of attorney, Your Honor,  
2 paragraph one it talks about in the beginning that it provides  
3 the authority to demand, sue, recover, and collect sums of  
4 money belonging to and claimed by the owner, trustee or the  
5 trust. They can send, obviously, notices of default, that is  
6 what's at issue in this case, and any other legal actions in  
7 tort, contract, or otherwise necessary to enforce the terms of  
8 the security instrument and to execute verifications.

9                   So I think that's where that language is coming from,  
10 Your Honor, in that first numbered paragraph that Selene could  
11 take any other legal actions to enforce the terms of the  
12 security instrument on behalf of its principal.

13                   THE COURT: Okay. I'm going to read that carefully.

14                   MR. MAGINNIS: Your Honor, if I can be less than a  
15 minute on the Illinois issue.

16                   THE COURT: Yes.

17                   MR. MAGINNIS: Just so that -- Ms. Accardi may or may  
18 not be aware of this. We had a status conference following the  
19 issuance of that order, and we said exactly what I just told  
20 you, which is a lot of people don't understand that mortgage  
21 servicers and lenders are not the same thing. They're two  
22 different paths and to be (indiscernible) to amend the  
23 complaint.

24                   So, obviously, we didn't do a good job of explaining  
25 that, but that order since it's been vacated, we are amending

1 the complaint. So, you know, if we did a poor job of  
2 explaining that in that complaint, hopefully we did a better  
3 job today, but that Costello case is an example of  
4 misunderstanding the roles.

5 Loan servicers do work for owners. They are not  
6 lenders.

7 THE COURT: Okay. All right.

8 Listen, thank you for the good briefing and the good  
9 arguments. This motion has been pending for a while, so I am  
10 trying to get it out as soon as I possibly can, and I will get  
11 you something hopefully quickly.

12 Do you have anything else from either side?

13 MR. MAGINNIS: Nothing from the plaintiff, Judge.

14 MS. ACCARDI: No, Your Honor.

15 THE COURT: All right. Enjoy the rest of the week  
16 everybody.

17 MS. ACCARDI: Thank you, you as well.

18 MR. MAGINNIS: Thank you.

19 THE COURT: Thank you all.

20 MR. HARRIS: Thank you, Your Honor.

21 (Proceedings were concluded.)

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## 2 C E R T I F I C A T E

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5 I, Patricia Diaz, Registered Professional Reporter,  
6 in and for the United States District Court for the Southern  
7 District of Florida, do hereby certify that I transcribed from  
8 digital audio recording the proceedings had the 14th day of  
9 August, 2024, in the above-mentioned court; and that the  
10 foregoing transcript is a correct and complete transcript of  
11 said digital audio recording.

12

13

14 September 2, 2024 /s/Patricia Diaz  
15 DATE PATRICIA DIAZ, FCRR, RPR, FPR  
16 Official Court Reporter  
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400 North Miami Avenue, 11th Floor  
17 Miami, Florida 33128  
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